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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

BANCO NACIONAL DE CUBA, PETITIONER

v.

PETER L. F. SABBATINO, AS RECEIVER AND F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE AND HELEN G. DOWNS, CO-PARTNERS DOING BUSINESS AS FARR, WHITLOCK & CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE COMMITTEE ON INTERNATIONAL LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE*

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BRIEF FOR THE COMMITTEE ON INTERNATIONAL LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE*

The Committee on International Law files this brief *amicus curiae* pursuant to consent of the parties hereto, submitted herewith.

INTEREST OF *AMICUS CURIAE*

The Association of the Bar of the City of New York has a membership of 7,000 lawyers admitted to practice in

the State of New York and elsewhere. The Association was incorporated by an Act of the Legislature of the State of New York passed in 1871. As stated in its Charter, its purposes include "cultivating the science of jurisprudence [and] promoting reforms in the law . . ."

The Association has a long standing concern for legal problems affecting international trade and investment and the maintenance and orderly development of international law on this subject. In 1959 its Committee on International Law issued a Report entitled "A Reconsideration of the Act of State Doctrine in United States Courts" which was cited in the opinions of both of the lower courts in this case. Since this is the first subsequent case to reach this Court raising the question whether the so-called act of state doctrine should in fact be reconsidered, the Committee on International Law has been authorized by the Association's Executive Committee to present in the form of this brief an expanded and more fully considered presentation of the Committee's views on this critical question as well as a discussion of the rules of international law which should be applied if that doctrine is determined to be inapplicable in this case.

QUESTIONS PRESENTED

This brief will discuss the following questions:

(1) whether the issue as to the effect to be given a taking of property by a foreign state is justiciable under the Constitution and a proper subject of adjudication in our courts.

(2) whether courts in the United States may refuse to give effect within the United States to a taking of property by a foreign state which violates international law; and

(3) whether the Cuban taking involved in this case violated international law.

STATEMENT

Petitioner, the financial agency of the Cuban government, brought this action in the District Court seeking money damages. Petitioner alleged conversion by the respondent partnership, a New York sugar broker, of the proceeds of the sale of a shipment of sugar, which had been taken by the Cuban government pursuant to a "nationalization" and "compulsory expropriation" decree. At the time of the taking, the sugar was located in Cuba and was owned by Compania Azucarera Vertientes-Camaguey de Cuba, a Cuban corporation in which, according to the decree, U. S. nationals "have a predominating interest".

Pursuant to a New York statute (Civil Practice Act, § 977-b), authorizing the appointment of a receiver to liquidate the assets of a foreign corporation which have been nationalized by a foreign decree but which are located in the State of New York, a New York court ordered the proceeds in question turned over to respondent Sabbatino, the court-appointed receiver. Petitioner thereafter amended its complaint to seek an injunction restraining Sabbatino from exercising jurisdiction over the sums paid to him.

The District Court dismissed the complaint on the ground that the Cuban taking violated international law. 193 F. Supp. 375 (S. D. N. Y. 1961). The Court of Appeals affirmed unanimously, 307 F. 2d 845 (2d Cir. 1962) and this Court granted certiorari, 372 U. S. 905 (1963).

SUMMARY OF ARGUMENT

I

A. The issue as to the effect to be given within the territorial jurisdiction of the United States to a taking of property by a foreign state is justiciable under the Constitution. There is no "textually demonstrable constitutional commitment of the issue to a coordinate political department"; and none of the other factors cited in *Baker* v. *Carr*, 369 U. S. 186, 211-17 (1962), which would render it a nonjusticiable "political question", is present.

B. No statute, treaty or Executive agreement exists which would remove the issue from the Art. III judicial power and the jurisdictional statute (28 U. S. C. § 1332). In several of the cases relied upon by petitioner and the Solicitor General in this case, *e.g.*, *United States* v. *Belmont*, 301 U. S. 324 (1937), *United States* v. *Pink*, 315 U. S. 203 (1942), *Shapleigh* v. *Mier*, 299 U. S. 468 (1937), *Bernstein* v. *Van Heyghen Freres S. A.*, 163 F. 2d 246 (2d Cir.), *cert. denied*, 332 U. S. 772 (1947), there was a treaty or Executive agreement providing for or leading to an overall settlement of claims against the taking government, which had the effect of barring individual adjudications in our courts. However, when, as here, no supervening statute, treaty or Executive agreement exists, the courts have a Constitutional and statutory duty to adjudicate the rights of the parties before them.

The most a court of properly invoked jurisdiction may do is temporarily to abstain from an adjudication without dismissing the action, see *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U. S. 25 (1959). Such abstention, in the discretion of the court and subject to review on appeal, would provide whatever safeguards may be necessary to

avoid the possibility of interference with diplomatic negotiations.

A rule requiring some specific form of communication from the Executive as a prerequisite to the exercise of the court's jurisdiction would constitute an unwarranted abdication of judicial responsibility (except in a case like *Bernstein, supra,* where an overall Executive agreement existed but it was unclear whether that agreement was intended by the contracting states to bar individual adjudications in our courts).

C. No claim of "sovereign" or other immunity, which is required and well-defined by rules of international law, United States statutes, treaties or Executive agreements, has been asserted. No comparable rules or laws justify refusal to adjudicate an issue as to the effect to be given a taking of property by a foreign state when no claim of immunity is or may be asserted.

II

In choosing the law to be applied in adjudicating the issue as to the effect to be given within the territorial jurisdiction of the United States to a foreign state taking, our courts should not be obliged, as language in some earlier cases might suggest, automatically to apply the domestic law of the taking state (the lex situs) as "a rule for their decision", *Ricaud* v. *American Metal Co.*, 246 U. S. 304, 309 (1918). Under traditional choice of law rules, our courts would be free to refuse effect to the lex situs in so far as it is inconsistent with the minimum standards embodied in international law. This Court should not, without constitutional or statutory authority, impose upon the courts of the country an exceptional requirement that they give unquestioned effect to the lex situs whenever it is a so-called "act of state."

Such requirement would be contrary to the leading decisions in other countries, which are collected in Appendix I, would deal a serious blow to the development of a growing international jurisprudence establishing the rule of law in regard to aliens and their property, and make the United States virtually the only safe haven for the disposal of property seized in violation of international law.

Application by our courts of international law to deny effect to a foreign state taking violative of that law cannot reasonably be construed as an affront to a foreign sovereign, and thus injurious to amicable foreign relations. International law by definition establishes limits upon permissible sovereign conduct, and municipal courts in other countries do not hesitate to apply those limits to state acts.

Unless there has been an overall settlement embodied in a treaty or Executive agreement, adjudication of individual claims in our courts need not interfere with Executive action for the benefit of those injured by the foreign taking. Indeed, the inability of the taking government to pass good title in the United States to the taken property may be a powerful incentive for it to enter into an overall settlement. Even if interference with the conduct of foreign relations might be deemed possible in some circumstances, that is a matter for Congress to handle by legislation limiting the power of the courts in those circumstances. It is not a matter for this Court to resolve by the expedient of imposing a rigid choice of law rule.

Application by our courts of international law will assist the further judicial exposition of that law—which the political departments cannot do. In view of the poverty and inadequacy of international remedies, it is essential that the maintenance and development of international law be furthered by municipal courts.

Refusal of our courts to give effect in the United States to takings of property by foreign states which violate

international law will help deter international law violations and enhance respect for that law. It will thus promote international trade and investment, which can only flourish in an atmosphere governed by the rule of law.

Application of international law to determine the effect to be given a taking of property by a foreign state within the territorial jurisdiction of the United States does not derogate from principles of territorial sovereignty. Rather, it implements those principles by denying legal effect within our borders to acts condemned by international law.

The opinions in the early cases in this Court did not fully consider the effect to be given a taking of property which violates international law. In those cases, either the allegation of a violation of international law appears to have been groundless, or the case presented a question that was not properly justiciable. Moreover, although the leading case, *Underhill* v. *Hernandez*, 168 U. S. 250 (1897), was properly decided on the grounds of sovereign immunity, the expansive dicta in the opinion were misapplied in later cases which did not involve a claim of immunity.

In so far as the early cases in this Court may not be distinguished, they should be reexamined and overruled in light of today's entirely different legal setting and state of world affairs—which is marked, *inter alia*, by reliance upon the rule of law in lieu of the use of force by major capital exporting nations to protect their nationals and their property, and greater clarity and certainty of international law rules in regard to aliens and their property. Increased refusal of our courts to give effect in the United States to foreign laws or acts on grounds such as "public policy" should mean, *a fortiori*, that they should refuse to give effect to foreign state acts which violate well-defined rules of international law.

III

The Cuban taking involved in this case violated international law by reason of its failure to provide compensation—a fundamental requirement of international law. This requirement was recently reaffirmed by the adoption, by an overwhelming vote of the United Nations General Assembly, of a resolution stating that owners of nationalized property "shall be paid appropriate compensation . . . in accordance with international law." Resolution 1803 (XVII), adopted December, 1962.

The decisions of international tribunals and foreign municipal courts are in accord that compensation must be paid alien owners of property taken by a foreign state. Both the Executive and legislative branches of our government have implemented this requirement, which is generally recognized throughout the world, even by some communist states.

It is clear that the Cuban taking in this case did not provide for compensation as required by international law. Although the court of appeals rested its decision on the broader ground that the failure to pay compensation was accompanied by discrimination and retaliation, this Court should make clear that the failure to compensate violates international law whether or not these additional factors are present.

ARGUMENT

I

The Issue As To the Effect To Be Given a Taking of Property by a Foreign State is Justiciable Under the Constitution, and the Courts Have a Duty To Adjudicate It.

The effect to be given within the territorial jurisdiction of the United States to a taking of property by a

foreign state is a proper subject of adjudication in our courts. This issue clearly represents a "case or controversy" and otherwise falls within the judicial power under Art. III of the Constitution, and it is within the jurisdictional statutes, in this case 28 U. S. C. § 1332. Assuming no claim of "sovereign" or other immunity, the court therefore has a constitutional and statutory duty to adjudicate it unless:

(1) the issue is exclusively committed to the Executive by Arts. I and II of the Constitution as a "political question";

(2) a supervening exercise of the constitutional powers of the political departments (statute, treaty or Executive agreement) removes the particular case from judicial competence.

Each of these possibilities will be discussed separately below.

A. The Effect To Be Given a Taking of Property by a Foreign State Is Not a "Political Question"

The issue as to the effect to be given in the United States to a taking of property by a foreign state is not committed exclusively to the political departments by Arts. I and II of the Constitution, as is made clear by the opinion of this Court in *Baker* v. *Carr*, 369 U. S. 186, 211-17 (1962), which outlined the contours of the "political question" doctrine. None of the factors there cited as committing an issue exclusively to the political departments, thus removing it from the scope of judicial competence, is present in this type of case.

Unlike cases involving a question of recognition of a foreign sovereign, which are committed to the Executive

under its power derived from Art. II, § 2 of the Constitution, this type of case does not involve a "textually demonstrable constitutional commitment of the issue to a coordinate political department", *ibid.*, a factor present in other classes of cases held to be excluded from the judicial sphere by the Constitution. See, *e.g.*, *Colegrove* v. *Green*, 328 U. S. 549 (1940), involving the power of Congress under Art. I, § 4, to prescribe the manner of holding congressional elections, and *Luther* v. *Borden*, 48 U. S. (7 How.) 1 (1849), involving the Art. IV, § 4, power to guarantee a republican form of government to the States.

Cases involving an issue of "sovereign" immunity, in which the court looks to the Executive for a "suggestion" of immunity prior to exercising jurisdiction, *Rich* v. *Naviera Vacuba, S. A.*, 197 F. Supp. 710 (E. D. Va.), *aff'd*, 295 F. 2d 24 (4th Cir. 1961), are not analogous and do not indicate that the issue here presented involves a nonjusticiable "political question". The only properly nonjusticiable "political question" in the "sovereign" immunity cases is whether or not the government in question is duly recognized, "an initial policy determination of a kind clearly for nonjudicial discretion," *Baker* v. *Carr*, 369 U. S. at 217. See discussion, *infra*, p. 15.

An early case in this Court raising an issue as to the effect to be given in the United States to a Mexican taking, *Oetjen* v. *Central Leather Co.*, 246 U. S. 297 (1918), contains language that a "political question" was involved. However, it appears from the context that this language referred to the nonjusticiability of the issue of recognition of the taking power as the legitimate government of Mexico and not to the issue as to the effect to be given the taking. Moreover, the opinion for the Court in *Baker* v. *Carr*, 369 U. S. at 211, characterized the broad nonjusticiability language of *Oetjen* as overly "sweeping" and stated that

"it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."

The courts should not look to the Executive to determine whether an issue such as that here presented is justiciable under the Constitution. Whether a matter is or is not a "political question"—*i.e.*, "whether a matter has in any measure been committed by the Constitution to another branch of government"—"is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *Baker* v. *Carr*, *supra*, at 211.

B. Adjudication of the Issue as to the Effect To Be Given the Cuban Taking is Not Barred by Statute, Treaty or Executive Agreement.

No statute, treaty or Executive agreement—a specific exercise of the powers of the political departments under Arts. I and II of the Constitution—exists which would remove this litigation from the Art. III judicial power and the jurisdictional statute (as in many of the cases relied upon by petitioner and the Solicitor General).* No such authority is cited which would justify this Court in refusing to exercise the jurisdiction which has been specifically conferred upon it under the Constitution.

The political departments under Articles I and II of the Constitution could, within limits, confine the power of the federal and State courts to review or award relief in respect of foreign state acts. See generally HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 288-340

*See Brief For the United States as Amicus Curiae, pp. 20-21, citing *United States* v. *Belmont*, 301 U. S. 324 (1937), *United States* v. *Pink*, 315 U. S. 203 (1942), *Shapleigh* v. *Mier*, 299 U. S. 468 (1937), and *Bernstein* v. *Van Heyghen Freres, S. A.*, 163 F. 2d 246 (2d Cir.), *cert. denied*, 332 U. S. 772 (1947).

(1953). They could adopt statutes,* or enter into treaties or Executive agreements with foreign governments which bind the United States, including its courts, both State and federal. Thus, they could agree with the taking government upon an overall settlement of claims of all U. S. citizens injured by a foreign taking which expressly or impliedly precludes State and federal courts from adjudicating individual claims falling within the scope of the settlement. The Executive agreement between the United States and the Soviet Government, the so-called Litvinov Assignment, was held to bar suits in our courts by individuals asserting claims against the Soviet Government which came within the scope of that agreement, *United States* v. *Belmont*, 301 U. S. 324 (1937) and *United States* v. *Pink*, 315 U. S. 203 (1942). Similarly, a treaty between the United States and Mexico establishing an International Claims Commission to which former owners of property taken by the Mexican Government could submit claims for reparation had the effect of precluding review of such claims in our courts, *Shapleigh* v. *Mier*, 299 U. S. 468 (1937). In *Bernstein* v. *Van Heyghen Freres, S. A.*, 163 F. 2d 246 (2d Cir.), *cert. denied*, 332 U. S. 772 (1947), the Executive had entered into a four-power agreement ("Declaration") pursuant to which all outstanding claims against the Nazi government were

*As examples of statutes limiting judicial power, see 22 U. S. C. §§ 252-53 (barring suits in State or federal courts against diplomats and their domestics); 28 U. S. C. § 1251(a)(2) (limiting original jurisdiction of the Supreme Court to suits against ambassadors and ministers consistent with the law of nations); 29 U. S. C. §§ 101-115 (Norris-LaGuardia Act limiting jurisdiction of federal courts to issue labor injunctions); 28 U. S. C. § 1341 (Tax Injunction Act limiting jurisdiction of federal courts to enjoin enforcement of State tax statutes); 28 U. S. C. § 1342 (Johnson Act limiting federal court power to enjoin orders of State regulatory agencies); 28 U. S. C. § 2083 (barring federal courts from enjoining proceedings in State courts).

sequestered, and an individual claim in our courts was deemed potentially inconsistent with future four-power procedures for settling such claims. *Id.* at 250-51.

However, in the absence of a supervening statute, Executive agreement or treaty, the courts have a duty to adjudicate the rights of parties properly before them (assuming no claim of immunity), and dismissal of the complaint would be a denial of the mandate imposed upon the courts by the statutes establishing their jurisdiction (in this case 28 U. S. C. § 1332). See *Meredith* v. *Winter Haven*, 320 U. S. 228 (1943); *Allegheny County* v. *Mashuda Co.*, 360 U. S. 185 (1959). See also *Anderson* v. *Transandine Handelmaatschappij*, 289 N. Y. 9, 15 (1942); *Russian Reinsurance Co.* v. *Stoddard*, 240 N. Y. 149, 158 (1925).

The most a court of properly invoked jurisdiction may do is to abstain from adjudication without dismissing the complaint. See *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U. S. 25, 27 n. 2 (1959); and see *Bank of China* v. *Wells Fargo Bank & Union Trust Co.*, 92 F. Supp. 920 (N. D. Cal. 1950). This a court might do if it determined, on the basis of a communication from the Executive or otherwise, that an immediate adjudication would adversely affect, for example, the conduct of ongoing negotiations leading to a treaty or Executive agreement which would provide for an overall settlement. Such abstention need not constitute an abdication of judicial responsibility, but only a postponement of a decision on the merits.*

*A pertinent analogy is presented by cases in which the federal courts have exercised their discretion to abstain from immediate adjudication of cases involving the official acts of States of the United States, including the taking of property of out-of-State citizens, pending the outcome of litigation to be brought by the parties in State courts. *Louisiana Power & Light Co.* v. *City of Thibodaux*, *supra*.

Abstention, in the discretion of the court, subject to review on appeal, would provide whatever safeguards may be necessary to avoid undue interference with Executive prerogatives in the foreign affairs field. It would be unnecessary as well as constitutionally and statutorily unjustifiable to go further and foreclose the courts forever from adjudicating cases and controversies properly before them.

It follows that Executive consent to the exercise of the courts' jurisdiction is not required. A rule requiring some specific form of communication from the Executive as a prerequisite to the exercise of the courts' jurisdiction would constitute an unwarranted abdication of judicial responsibility. It might also be disruptive of the proper conduct of foreign relations by obliging the Executive to take an official position in circumstances in which the mere taking of a position, one way or the other, could prove highly embarrassing to the United States. Maintenance of the separation of powers principle thus has the advantage of permitting the Executive to remain detached from the judicial process. Of Course, in a case like *Bernstein* v. *Van Heyghen Freres, S. A., supra,* where an Executive agreement existed but it was unclear whether the contracting states intended to bar claims in municipal courts, a court might properly abstain until informed by the Executive that the agreement did not preclude adjudication.

This is not to say that the courts may not in their sole discretion request comment (*in camera* if necessary) from the Executive, or otherwise take into consideration any material which may be presented to them indicating the necessity for abstention. It is only to say that the courts are not bound to act solely pursuant to an expression of consent from the Executive.

C. No Claim of "Sovereign" or Other Immunity Is Involved.

It is not contended, nor could it be, that either of the parties or the property in this case is entitled to "sovereign" or other immunity. Nevertheless, petitioner and the Solicitor General* invoke immunity cases as supporting the proposition that the courts may not review so-called "acts of state". But denial of adjudication in immunity cases rests on a quite different ground—namely, that the defendant or property before the court is entitled to immunity from suit or sequestration under specific statutes which trace back to the Judiciary Act of 1789 and are based upon international law**, or treaties, Executive agreements and more recent statutes† or, in some situations—notably those involving sovereign property such as warships, the *Schooner Exchange* v. *McFaddon*, 11 U. S. (7 Cranch) 116 (1812)—well defined rules of international law which must be applied by United States courts on pain of committing a compensable international delinquency.

There are no comparable rules of international law or any statutes, treaties or Executive agreements which would require refusal to adjudicate an issue involving a taking of property by a foreign state. Therefore, the rationale of, or analogy to, the immunity cases is wholly inapposite.

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*See Brief for the United States as Amicus Curiae, pp. 14-17, especially n. 7, p. 16.

**See 22 U. S. C. §§ 252-53 and 28 U. S. C. § 1251(a)(2). HART & WECHSLER, THE FEDERAL COURTS AND FEDERAL SYSTEM, 264-67 (1953).

†See, *e.g.*, International Organization Immunities Act, 22 U. S. C. §§ 288-288f (1958), and Headquarters Agreement with United Nations, June 26, 1947, 61 Stat. 3416, TIAS 1676.

II

Courts in the United States Should Refuse to Give Effect Within the Territorial Jurisdiction of the United States to a Taking of Property by a Foreign State Which Violates International Law.

In choosing the law to be applied in determining the effect to be given within the territorial jurisdiction of the United States to a taking of property by a foreign state, our courts should not be required, as the language of some earlier cases might suggest, automatically to apply the domestic law of the taking state as "a rule for their decision". *Ricaud v. American Metal Co.*, 246 U. S. 304, 309 (1918). Such a requirement, which would have no constitutional or statutory basis, would in effect impose upon the courts a rigid choice of law rule different from that which they would be free to apply under usual conflicts' rules. It would oblige them to give effect within the territorial jurisdiction of the United States to takings which violate the accepted norms of conduct embodied in international law.

Usual conflict of laws rules permit or perhaps require refusal by our courts to give effect here to any foreign transfer of ownership of property which is "in contravention of positive law and public interests". *Cleveland Machine Works* v. *Lang*, 67 N. H. 348, 31 Atl. 20 (1893); LALIVE, TRANSFER OF CHATTELS IN THE CONFLICT OF LAWS, 153 (1954); IV RABEL, CONFLICT OF LAWS, 88 (1958); RESTATEMENT OF THE CONFLICT OF LAWS § 612 (Supp. 1948); and see 7 HALSBURY'S LAWS OF ENGLAND 8-9 (1954). This view has been stated by Judge Learned Hand:

> "[N]o court will apply, indeed it might be argued that none can apply, any law save that of the

> government of which it is a part. A priori it would have been possible, when a transaction occurs elsewhere, for a court to shape the resulting rights and liabilities as though the transaction had occurred within the territory of the court's own government. That would of course not mean that in so doing a court would deny the fact that the transaction in the place where it occurred had created other rights and liabilities, but merely that for reasons of its own the state of the forum gave other rights and imposed other liabilities which seemed to it just. And indeed it is a well-settled exception to the usual doctrine that a court of the forum will take as its model the rights and liabilities which have arisen where the transactions took place, that the foreign rights and liabilities must not be abhorrent to the moral notions of its own state. We may assume that the same is true of a defense to an obligation which under the law of the foreign state would otherwise have been there enforceable. If so, it would be possible in the case at bar for a court of New York to treat as a nullity the transfer of the plaintiff's shares upon the ground that its legal effect—depriving the plaintiff of property otherwise recognized in Germany itself—was utterly odious to the accepted standards of justice of that state. . . ."*

Refusal to give effect to foreign transfers of property which violate international law is more than an implementation of public policy or "moral notions" of the United

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*Bernstein v. Van Heyghen Freres S. A., 163 F. 2d 246 (2d Cir.), cert. denied, 332 U. S. 772 (1947). However, the court held that the case was not justiciable because adjudication in our courts would be potentially inconsistent with an agreement between the Executive and the other three occupying powers providing for "the adjudication [in Germany] of all controversies" arising out of Nazi expropriations. 163 F. 2d at 251. Moreover, the case did not involve a violation of international law rules in regard to alien property since the former owner was a German national.

States. It is the application of objective rules of law, accepted by nations generally, which are applied by our courts as part of the law of the United States, *The Paquete Habana*, 175 U. S. 677, 700 (1900). These rules are consistent with our own clearly defined national policy, embodied in the Constitution and in the constitutions and statutes of the several States, on the subject of the taking of property.

Therefore, our courts should "treat as a nullity" within the territorial jurisdiction of the United States a taking of property by a foreign state which violates international law. They should apply the lex situs of the property at the time of the taking modified—and this is the crux of the matter—by the substantive rules of international law. These rules, which are applied by our courts as part of the law of the United States, should be the screen through which the lex situs must be passed before it may be given effect within our own territory.

There is no sound basis for requiring that, when the lex situs happens to be a so-called "act of state," our courts must automatically give it effect in the United States, even if it violates the minimum standards of international law. The argument that such an exceptional requirement should be imposed upon the courts of the country by this Court, acting without any constitutional or statutory authority, is based upon vague policy arguments and a few early cases in this Court. It should be rejected for the reasons elaborated below.

At the outset it should be emphasized that the leading decisions in other countries, despite some occasional lower court decisions to the contrary, show that these countries almost invariably refuse to give effect to takings of property by foreign states which violate international law or are contrary to the public policy of the forum. The relevant cases are collected in Appendix I. A decision by this Court

barring our courts from refusing effect to foreign takings which violate international law would deal a serious blow to the development of a growing international jurisprudence establishing the rule of law in regard to aliens and their property. It would also, quite ironically, make the United States virtually the only safe haven for the disposal of property seized in violation of international law.

A. Refusal To Give Effect to a Foreign Taking Which Violates International Law Cannot Imperil Amicable Foreign Relations.

The principal policy argument for the proposition that special deference should be accorded so-called "acts of states" appears to be a concern with the possible imperilment of amicable foreign relations. However, use by our courts of international law rules as a basis for refusing effect to foreign state takings cannot reasonably be construed as an affront to a foreign sovereign, and thus injurious to amicable foreign relations, since international law by definition establishes limits upon permissible sovereign conduct. It reflects the experience and practice of nations generally and is the recognized standard by which acts of all states must be governed.

The untenable nature of this argument of special deference as a general proposition is illustrated by the facts of this litigation. The Executive has already expressed in formal diplomatic protests its belief that the Cuban taking constituted a flagrant violation of international law—as usually has been and will be the case whenever substantial rights of U. S. citizens are affected by a foreign taking violative of international law. See pages 35-36 *infra*. Under these circumstances, it is impossible to argue that decisions by our courts, following a full judicial determina-

tion that the taking in fact violated international law, would constitute a further affront to the taking government.

The practice of other states, as demonstrated by the cases collected in Appendix I, indicates that refusal to give effect to foreign takings which violate international law cannot reasonably be viewed as an affront to a foreign sovereign or disruptive of amicable foreign relations. A foreign state acting in violation of international law may not, in this day and age, expect such acts to be upheld outside of its own territorial jurisdiction.

Of course, if the decision of our court is not in conformity with international law, and the taking state or its nationals have been injured by the decision, the taking state may then complain through diplomatic channels. See Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 Am. J. Int'l. L., 168, 169 (1946). But restricting persons injured by a foreign state taking solely to diplomatic channels, and imposing upon their state the burden of making complaint in the first instance, is not only unjust but may well have the additional undesirable effect of bypassing any possibility of a judicial decision on what is fundamentally a legal question—whether or not the taking violated international law.

B. Judicial Decisions Applying International Law Need Not Interfere with the Conduct of Foreign Relations.

Unless there has been an overall settlement embodied in an Executive agreement or treaty, adjudication of individual claims by our courts, applying international law, need not interfere with Executive action for the benefit of those injured by the foreign taking. Indeed, decisions of our courts as well as of municipal courts elsewhere, refusing to give effect to the title of the taking government, or of transferees from it, may operate as a powerful incentive to the

taking government to arrive at an amicable settlement. If it could no longer pass good title in the United States to the taken goods, the taking government might be encouraged to enter into a treaty or Executive agreement providing for an overall settlement which would validate its title and have the effect of barring further adverse adjudications in our courts.

Certainly a decision on the merits giving effect in the United States to a taking of property by a foreign state, following a judicial determination that it was consistent with international law, would not interfere with the proper conduct of diplomatic negotiations by the Executive. Under the substantive rules of international law, such decision would necessarily mean, *inter alia*, that the former owners of the taken property received compensation meeting the standards established by international law. The Executive would thus have no tenable claim for compensation under international law which could be asserted in negotiations with the taking state.

Nor should it be assumed that our courts would render a "wrong" decision, sustaining a taking which, for example, fails to provide compensation meeting the standards established by international law. The question whether international law has or has not been violated is of the same type which our courts must daily decide under our own Constitution and statutes in regard to public takings of property within the United States. It involves a legal issue requiring customary adjudicatory techniques for its resolution, and a court of law is, if anything, a better forum in which to resolve it than whatever channels might be established within the politically controlled Executive Branch.

Even if application of international law to screen foreign state acts might be viewed in some circumstances as interfering with the conduct of foreign relations by the Execu-

tive, that is a matter for Congress to handle by legislation specifically setting forth those circumstances and limiting the power of the courts accordingly. It is not a matter for this Court to resolve by the expedient of imposing upon the courts an extraordinary choice of law rule—a rule which results in abdication of judicial responsibility to apply the proper law in a broad class of cases. That is a legislative not a judicial function.

C. Application of International Law by Courts in the United States Promotes the Maintenance and Development of International Law.

The application by our courts of international law in determining whether to give effect here to a taking of property by a foreign state will assist the further judicial exposition of a comprehensive body of international law on the subject of the taking of alien-owned property. The adjudication of law suits in courts of law is the only effective means of maintaining and developing rules of international law and general acceptance of and respect for that law. Only the imprimatur of a court is capable of attesting the "jural quality" of a rule of international law, and "such imprimatur cannot be impressed by the political branch of a government", whose decisions are designed to meet the political exigencies of each situation as it arises. See Jessup, *supra*, at 172.

In view of the poverty and inadequacy of international machinery and remedies, in the form of international tribunals or otherwise, it is essential that the exposition of international law be undertaken by municipal courts. See Jessup, *supra*, at 172.* It is unsound to argue that this

*Professor Jessup, now a member of the International Court of Justice, states:

> "there is more need today than there ever has been for the cooperation of national courts in contributing to the de-

Court and other courts in the United States cannot and should not play a role in maintaining and developing a body of international law on the subject of the taking of alien-owned property. Decisions of courts of law are if anything less likely to be influenced by parochial nationalism than the decisions of the political departments of our government.

It cannot be denied that decisions by this Court and other courts in the United States would further the maintenance and development of international law on this subject.* As is true with any rule of law, a few sound precedents establish guidelines by which persons seeking to avoid recourse to the courts tailor their conduct.

By contrast, refusal by this Court to uphold international law, by automatically applying as rules of decision

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velopment of international law. The new International Court of Justice and occasional arbitral courts will continue to play their part, but their activities should be abetted and supplemented by the courts of the various states. . . ."

*"JESSUP, THE USE OF INTERNATIONAL LAW 85 (1959)

"The courts of the United States could make a more significant contribution to the development of the rule of law among nations, which, as we have seen is standard policy of the United States as well as a desideratum in the minds of all men of good will. If the courts of the leading power of the free world support by their silence or by their jurisprudential verbiage the notion that there is no international law, they certainly lend no support to the Department of State when it seeks to protect American interests abroad. If it were only realized, their present attitude contributes the greatest possible embarrassment to the Executive in its conduct of foreign policy.

"At this point we shall again be told that foreign policy is based on power, and international law, like morality, has no place in the deadly serious business of the cold war. We can only refer back to what we have already said and observe that the Supreme Court does not make any contribution to national objectives by declining to be an accomplice in the plot to bolster the international rules of law. The court is certainly not insensitive to domestic, economic and social forces; why should it be insensitive to the national interest abroad? . . ."

foreign state acts violative of that law, would be a signal for retreat from the application of international law by municipal courts throughout the world.

D. Refusal to Give Effect to the Foreign Taking Deters Violations of International Law and Promotes International Trade and Investment

Application of international law by municipal courts may also serve as a deterrent to future violations of international law by, in effect, denying the taking power access to essential markets for the expropriated property. The existence of this deterrent effect is demonstrated by the vigor with which the expropriating government in this case resists adjudication in municipal courts and the application of international law rules by these courts.

Although it is said that refusal of municipal courts to give effect to foreign takings violative of international law undermines "certainty" in subsequent international transactions in property subject to such takings, this brake upon international traffic in illegally expropriated property is a necessary and desirable concomitant of effective enforcement of rules of international law.

Increased enforcement of and respect for the rule of law, which at the present time may most effectively be achieved if international law is applied by municipal courts, is the best guarantor of meaningful certainty in international trading and investment relationships generally. Automatic recognition by municipal courts of foreign takings violative of international law would have a crippling effect upon foreign investment, especially in the less developed areas, which it is the policy of the United States to encourage. See § 601(a), Foreign Assistance Act of 1961, 22 U. S. C. § 2370. Private and governmental investors will take fewer risks if they may not look to an international

investment climate in which the rule of law is supreme and may not be heard in any judicial tribunal to seek redress for unlawful takings.

E. Refusal to Give Effect to the Foreign Taking Does Not Derogate From Principles of Territorial Sovereignty.

Application of international law to determine the effect to be given here to a foreign state taking of property implements territorial sovereignty by upholding the power of our courts to refuse to give legal effect within our borders —that is, extraterritorial effect—to foreign state acts done abroad which violate international law. The question is not whether our courts may extend their writ to affect persons or subject matter within the territory of a foreign sovereign, see, *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347 (1909). It is whether the United States must surrender its own territorial sovereignty to the extent of requiring that every act of every foreign state within its territory automatically be accorded, within the territory of the United States, the full protection and imprimatur of our legal system, even when it is an act of international outlawry committed against our own citizens to the detriment of our own internal economy.

It is clear beyond doubt that our courts need not give effect here to foreign state takings violative of international law in so far as they purport to affect property located here at the time of the taking, *e.g.*, *Sokoloff* v. *National City Bank*, 239 N. Y. 158, 167 (1924). The result should be no different in so far as they affect property (or its proceeds) which the taking state later suffers or causes to come into our territory in an attempt to profit here from the unjust enrichment which took place abroad at the expense of United States citizens.

F. Application of International Law by Courts in the United States in Determining the Effect To Be Given a Foreign Taking Is Not Precluded by Judicial Precedent.

In the principal cases in this Court cited as requiring our courts automatically to give effect here to a taking of property by a foreign state, the opinions have not fully considered the problems raised by a taking of property which violates international law. In the leading case, *Underhill* v. *Hernandez*, 168 U. S. 250 (1897), no taking of property was involved, and, since the defendant was being sued for actions taken in his capacity as an official of a foreign government, sovereign immunity was clearly applicable and was stated as a ground for the decision. 168 U. S. at 252. In *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347 (1909), the only alleged violation of international law was the exercise of governmental authority in the territory of another state; but the territory was in dispute, and recognition of the ownership of disputed territory is clearly the sort of political question that is not justiciable in our courts. *Baker* v. *Carr*, 369 U. S. 186, 212 (1962).

In *Oetjen* v. *Central Leather Co.*, 246 U. S. 297 (1918), the taking of property was from a national of the taking state. Although there was an allegation that the taking violated international law as embodied in the Hague Convention, the Court expressly indicated that there was probably no such violation because the Convention did not apply, or, if it did, permitted military requisitions of the type involved. 246 U. S. at 301-02. Most subsequent lower court cases (the recent Cuban cases excluded) have likewise involved takings or other acts directed against nationals of the acting state, and no international law violation in regard to aliens or their property could have been alleged in those cases. See, *e.g.*, *Bernstein* v. *Van Heyghen, Freres S. A.*, 163 F. 2d 246 (2d Cir. 1946), *cert. denied*, 332 U. S. 772

(1947); *Salimoff & Co.* v. *Standard Oil Co.*, 262 N. Y. 220 (1933); *United States ex rel. Steinwerth* v. *Watkins*, 159 F. 2d 50 (2d Cir. 1947); *Banco De Espana* v. *Federal Reserve Bank*, 114 F. 2d 438 (2d Cir. 1940). *Luther* v. *Sagor* [1921] 3 K. B. 532 and *Princess Paley Olga* v. *Weisz* [1929] 1 K. B. 718, also involved takings from nationals of the taking state.

In *Ricaud* v. *American Metal Co.*, 246 U. S. 304 (1918), there was a claim that title to the property was in an American national, although the property was actually taken from the possession of the Mexican seller. However, since seizure was for a legitimate governmental purpose and was accompanied by a promise to pay compensation, it is doubtful that there was any violation of international law. In *Shapleigh* v. *Mier*, 299 U. S. 468 (1937), the plaintiffs conceded without argument that any alleged violation of international law could not be the basis for their claim because a treaty between the United States and the taking state had established an International Claims Commission to which the plaintiffs had already submitted a claim for reparation. In any case, the opinions in both *Ricaud* and *Shapleigh* applied the earlier precedents, in which no international law violation was clearly involved, without analysis of the question whether the outcome should be different if an international law violation were squarely presented.

As noted above, the decision in *Underhill* v. *Hernandez*, 168 U. S. 250 (1897), despite more expansive dicta both of this Court and the court below, 65 Fed. 577, 579 (2d Cir. 1895), appears to have been based upon "the immunity of individuals from suits brought in foreign tribunals for acts done within their own States in the exercise of governmental authority". 168 U. S. at 252. In *Oetjen*, *Ricaud* and *Shapleigh*, this Court applied the expansive dicta of *Underhill* without considering the relevance of the fact that

no possible claim of soverign immunity was involved in those later cases.

As discussed above, *supra*, at p. 15, this fact was highly relevant. "Sovereign" or other immunity has nothing to do with the choice of substantive rules of law but, rather, with the immunity of defined persons or property from the law or from judicial process.* Such immunity is required by well defined rules of international law as well as by specific statutes, treaties and Executive agreements, and a failure by United States courts to grant immunity required to be given by international law would render the United States liable to pay compensation to the offended state. By contrast, there is no doctrine of international law or practice (see cases collected in Appendix I) which requires municipal courts to apply as a rule for their decision a taking of property by a foreign state which violates international law. If anything, the reverse is true since the United States might be deemed itself to have committed a violation of international law (insofar as aliens are involved) by permitting a taking of property violative of that law to be given effect in the United States.

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*Even in the sovereign immunity cases the legal question whether a claim of immunity should be upheld is one for independent adjudication by the courts and not for the Executive to decide, notwithstanding some language in *Republic of Mexico* v. *Hoffmann*, 324 U. S. 30 (1945). See Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 Am. J. Int'l L. 168 (1947). See *Berizzi Bros. Co.* v. *The Pesaro*, 271 U. S. 562 (1926), upholding a claim of sovereign immunity under international law even though the Department of State had refused to suggest it, and *Stephen* v. *Zivnostenska Banka*, 15 App. Div. 2d 111, 222 N. Y. S. 2d 128 (1st Dep't 1961), *aff'd*, 12 N. Y. 2d 781 (1962), denying a claim of immunity apparently suggested by the Department of State. And see the "Tate Letter" (26 Dept. of State Bull. 984 (1952)) in which it is stated that "it is realized that a shift in policy by the executive [as to whether immunity is legally justified in a given situation] cannot control the courts. . . ."

C. In the Alternative, Judicial Precedent Should Be Re-examined To Permit the Application of International Law.

In so far as early cases in this Court may be construed to require our courts to give unquestioned effect to foreign takings of property which violate international law, they should be re-examined and overruled. Those cases arose in an entirely different legal setting and state of world affairs. Rules of international law in regard to protection of alien-owned property were less well developed, partially because capital exporting states were willing and able to use force to protect the property rights of their citizens. Relinquishment by major capital exporting states of the use of force, and the growing responsibility of individual states to the international community generally, warrant more effective judicial enforcement of rules of international law as against foreign acts of state which violate them. Decline of the positive law concept that the sovereign can do no wrong, which is reflected in cases cutting back the doctrine of sovereign immunity, *e.g., Republic of Mexico* v. *Hoffman*, 324 U. S. 30 (1945), also justifies reconsideration of the earlier precedents. And the greater clarity and certainty of rules of international law in regard to aliens and their property, developed through greater usage over the past half century, facilitates their application by municipal courts.

Our courts have increasingly refused to give effect here to rights and liabilities created by a foreign sovereign which are deemed to violate our own "public policy" or for other reasons.* For example, our courts have refused to give

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*In fact, it has been stated that "administrative acts of foreign governments have traditionally been denied recognition for the purpose either of enforcement or defense, presumably on the ground that the forum has no interest in furthering the foreign sovereign's governmental purposes." EHRENZWEIG, CONFLICT OF LAWS 170 (1962).

effect to foreign judgments, *Hilton* v. *Guyot*, 159 U. S. 113 (1895), to recognize the dissolution or liquidation of foreign corporations, *Vladikavkazsky Railway Co.* v. *New York Trust Co.*, 263 N. Y. 369 (1934), to enforce foreign fiscal or penal legislation, *Loucks* v. *Standard Oil Co. of New York*, 224 N. Y. 99 (1918), to recognize a taking of personal property by a belligerent government of occupation in occupied territory, *The Netherlands* v. *Federal Reserve Bank*, 99 F. Supp. 655 (S. D. N. Y. 1951), *rev'd on other grounds*, 201 F. 2d 455 (2d Cir. 1953), and to give effect to foreign takings of rights of aliens under contracts to be performed in the taking state, *Frenkel & Co.* v. *L'Urbaine Fire Ins. Co.*, 251 N. Y. 243, 249 (1929) (alternative holding). Section 977-b of the New York Civil Practice Act, as construed and applied in this case, indicates that giving effect to a foreign expropriation decree is contrary to the clear "public policy" of New York.*

This refusal of our courts to give effect within the territorial jurisdiction of the United States to foreign acts or laws on grounds of "public policy" should mean, *a fortiori*, that they should refuse to give effect here to foreign acts or laws which violate well-defined rules of international law.**

The argument that so-called "acts of state" are entitled to exceptional deference and automatic application by our

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Schwartz v. *Compania Azucarera Ventientes-Comaquey de Cuba*, 28 Misc. 2d 355, 208 N. Y. S. 2d 833 (Sup. Ct.), *aff'd*, 12 App. Div. 2d 506, 207 N. Y. S. 2d 288 (1960). See also *Sulyok* v. *Penzintezeti Kozpont Budapest*, 279 App. Div. 528, 111 N. Y. S. 2d 75 (1st Dep't 1952).

**In *Aboitiz & Co.* v. *Price*, 99 F. Supp. 602 (D. Utah 1951), the court refused to apply, as a defense to the payment of a note, a law otherwise applicable under its conflict of-laws rule on the ground that the law violated international law.

courts, even when they violate well defined rules of international law, is inconsistent and illogical. It would have the effect of shielding in our courts states which wrongfully act directly rather than indirectly. If a foreign state prescribes a law permitting the wrongful taking of alien property by a public utility or by a municipality, or even by a state or province in a federal system, the taking would not constitute an "act of state" to which automatic recognition should arguably be accorded in our courts. See PROPOSED OFFICIAL DRAFT OF THE RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 4 (1962). By contrast, in a centralized system in which the power of eminent domain is exercised only by *ad hoc* decree of the sovereign itself, all takings would presumably be entitled to automatic recognition in our courts under the so-called act of state doctrine. If any general rule that our courts must automatically give effect to foreign law violative of international law is to be adopted, it would more logically be limited to those types of acts which are universally performed exclusively by the "state" itself, such as refusals to grant passports, *cf. Underhill* v. *Hernandez*, 168 U. S. 250 (1897), and assertions of territorial sovereignty over disputed border areas, *American Banana Company* v. *United Fruit Co.*, 213 U. S. 347 (1909).*

*This brief will not consider the special fact in this case that the plaintiff is an agency of the Cuban government, a fact not present in most of the cases arising out of the Cuban takings currently pending in the lower courts (see Memorandum for the United States, App. A, pp. 11-13). The Committee is concerned with the principles herein set forth, which should be dispositive of all the cases, regardless of the presence of this fact.

III

The Cuban Taking Involved in this Case Violated International Law

It is a fundamental principle of international law that states must provide compensation for the taking of alien-owned property. This principle is an essential element in a sound international order based on the rule of law and is necessary to the promotion of foreign trade and investment. It is of such vital importance to the interests of governmental and private investors in foreign countries, particularly in the new and less developed states, that the Court should address itself specifically to this aspect of this case and emphatically reaffirm the obligation under international law of a state taking alien-owned property to provide compensation.

Although the principle of compensation for taken property has long been recognized,* prior to World War I there were no large scale takings of the type which originated with the Russian Revolution of 1917 and the Mexican expropriation of oil properties of 1938. Following World War II, large scale takings of property under the name of "nationalization" or "expropriation" have occurred in various parts of the world.

Nevertheless, the principle of compensation for taken alien property has recently been emphatically reaffirmed by the international community in operative paragraph 4 of Resolution 1803 (XVII) adopted by the General Assembly of the United Nations in December, 1962, by a vote of 87 to 2 (France and South Africa) with 12 absten-

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*See Mann, *Outlines of a History of Expropriation*, 75 L. Q. Rev. 188 (1959); Grotius, *The Rights of War and Peace*, 92, 93 (Campbell translation 1901); Vattel, *The Law of Nations or the Principles of Natural Law*, 96 (Fenwick translation 1916).

tions (Soviet bloc, Burma and Ghana).* This reads in part as follows:

> "Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest. . . . In such cases the owners *shall be paid* appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and *in accordance with international law. . . .*" (Emphasis added)

In the debates preceding adoption of this resolution the United States made clear that "appropriate compensation" could, under international law, only mean prompt, adequate and effective compensation.** Other nations agreed with this point of view using such terms as "adequate" compensation (Madagascar and Nigeria), "due compensation" (Peru), "full and fair compensation" (Ireland), and "suitable compensation" (Greece).† Proposals by the Soviet Union which would have allowed taking without compensa-

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*"France voted against the Resolution because it still insisted that the subject was too complex for proper treatment in this forum and should have been referred to the International Law Commission; South Africa for reasons not explained, as no representative of South Africa spoke at all during the debate.

"The 12 abstentions comprised the Soviet bloc, including Cuba, and also Burma (which on this Resolution appeared to side mainly with the Soviet bloc) and Ghana, which stuck to its original submission that the matter should have been referred to the International Law Commission." *Committee Report*, 18 THE RECORD, ASS'N OF THE BAR OF THE CITY OF N. Y. 377, 393 (1963).

**U. N. Gen. Ass. Off. Rec. 17th Sess., 2nd Comm. 327 (A/C.-2/SR. 850).

†*Id.* at 298 (SR. 846).
Id. at 295 (SR. 845).
Id. at 295 (SR. 845).
Id. at 314 (SR. 848).
Id. at 333 (SR. 851).

tion or which would have left the question of compensation to be decided under the domestic law of the taking country were defeated.* See *Committee Report*, 18 THE RECORD, ASS'N OF THE BAR OF THE CITY OF N. Y. 377, 385-86 (1963).

This resolution was the culmination of a long period of study and debate on the subject of "permanent sovereignty over natural wealth and resources", during the course of which a comprehensive report was prepared by the Secretariat of the United Nations which includes a careful analysis of the international law authorities on the requirement of compensation. U. N. Doc. No. A/AC.97/5/Rev. 2 (1962) 94-98.

The decisions of international tribunals, while relatively few, have uniformly required compensation for the property of aliens which has been taken. Thus, the Permanent Court of International Justice, in dealing with seizures by Poland of German properties after World War I in relation to a German-Polish Convention concerning property rights, said:

> "[T]here can be no doubt that the expropriation allowed under . . . the Convention is a derogation from the rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights. As this derogation itself is strictly in the nature of an exception, it is permissible to conclude that no further derogation is allowed. . . ."**

The Court later declared:

> "The action of Poland which the Court has judged to be contrary to the Geneva Convention is

*Id. at 389 (SR. 858).

***German Interests in Polish Upper Silesia* (Merits), P. C. I. J. Judgment No. 7, May 25, 1926, ser. A, No. 7, 1 HUDSON, WORLD COURT REPORTS 510, 523.

not an expropriation—to render which lawful only the payment of fair compensation would have been wanting; it is a seizure of property, rights and interests which could not be expropriated even against compensation, save under the exceptional conditions fixed by Article 7 of the said Convention. . . ."*

All of the other decisions of international tribunals, which are collected in Appendix II, are in accord.

Municipal courts in other countries have also generally recognized the principle of compensation for taken alien-owned property. See cases collected in Appendix I.

This rule of international law, that compensation must be paid where alien-owned property is taken by a state, has long been recognized and vigorously asserted by the United States in its relations with other states. Secretary of State Cordell Hull stated the rule as follows in his famous Note of August 22, 1938, to the Mexican Ambassador:

> "[U]nder every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment thereof. In addition, clauses appearing in the constitution of almost all nations today, and in particular in the constitutions of the American republics, embody the principle of just compensation. These, in themselves are declaratory of the like principle in the law of nations.
>
> "The universal acceptance of this rule of the law of nations, which, in truth, is merely a statement of common justice and fair dealing, does not in the view of the government admit any divergence of

*_Chorzow Factory Case_ (Indemnity), P. C. I. J. Judgment No. 13, September 13, 1928; ser. A, No. 7, 1 HUDSON, WORLD COURT REPORTS 646, 677.

opinion." 3 HACKWORTH, DIGEST OF INT'L LAW 658-9.*

More recently the Department of State asserted, with reference to expropriation of land belonging to the United Fruit Company in Guatemala, for which compensation had been proferred in the form of "agrarian bonds" maturing in twenty-five years and in a fixed amount equal to the assessed values of the land for tax purposes:

> "The Government of Guatemala is . . . bound to give the full guarantee and protection of the law of Nations to foreign investment companies which operate in the territory of Guatemala. When states in the exercise of their sovereign prerogatives determine as a matter of policy to nationalize the property of foreign states or their nationals, they are under the obligation to pay just compensation for such property. . . .
>
> ". . .
>
> "Just compensation may be defined as that compensation which . . . is 'prompt', is 'adequate' and is 'effective'—otherwise the payment is not 'just'.
>
> "Payment in bonds maturing in 25 years, with interest at 3 percent per annum, and of uncertain market value is scarcely to be regarded as either prompt or effective payment. . . ."**

And with respect to the Cuban decree involved in this case, the United States Note of July 16, 1960, stated *inter alia:*

> "[T]he Government of the United States considers this law to be manifestly in violation of those

*See also U. S. Notes to Mexico of July 21, 1938 and April 3, 1940, in 3 HACKWORTH, DIGEST OF INT'L LAW 656, 662.

**29 Dept. State Bull. 357, 359 (1953).

principles of international law which have long been accepted by the free countries of the West. It is in its essence discriminatory, arbitrary and confiscatory.

"...

"The Nationalization Law is both arbitrary and confiscatory in that its provisions for compensation for property seized fail to meet the most minimum criteria necessary to assure the payment of prompt, adequate and effective compensation and in its specific prohibition of any form of judicial or administrative appeal from the resolutions of the expropriating authorities.*

Congress has also recognized the necessity under international law of compensation for taken property by the enactment of Section 301 of the Foreign Assistance Act of 1962 which added sub-section (e) to section 620 of the Foreign Assistance Act of 1961. This subsection provides that the "President shall suspend assistance to the government of any country" which has seized American-owned property without taking "appropriate steps" within six months "to discharge its obligations under international law . . . including *equitable and speedy compensation for such property in convertible foreign exchange, as required by international law.* . . .** (emphasis added)

Since 1945 the United States and other nations have incorporated the principles of prompt, adequate and effective compensation into numerous Treaties of Friendship, Commerce and Navigation. Thus, the United States treaties with Israel (in force April 3, 1954), Japan (in force October 30, 1953) and Korea (in force November 7, 1957),† include a provision stating:

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*43 Dept. State Bull. 171 (1960).
**76 Stat. 260, 22 U. S. C. § 2370(e).
†5 U. S. T. 550; TIAS 2948; art. VI para. (3).
4 U. S. T. 2063; TIAS 2863; art. VI para. (3).
8 U. S. T. 2217; TIAS 3947; art. VI para. (4).

> "'Property of nationals and companies of either Party shall not be taken except for a public purpose, nor shall it be taken without the payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and prompt payment thereof."

Provisions of similar effect are found in United States treaties with Denmark, Ethiopia, Federal Republic of Germany, France, Greece, Iran, Ireland, Italy, Muscat and Oman, Nationalist China, The Netherlands, Nicaragua, Pakistan and Vietnam.* See, *Committee on International Trade and Investment of the Section of International and Comparative Law of the American Bar Association, The Protection of Private Property Invested Abroad*, 43-47 (1963).

The principles embodied in these treaties are adopted in the PROPOSED OFFICIAL DRAFT OF THE RESTATEMENT OF

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*12 U. S. T. 908; TIAS 4797; art. VI para. (3).
4 U. S. T. 2134; TIAS 2864; art. VIII para. (2).
7 U. S. T. 1834; TIAS 3593; art. V.
11 U. S. T. 2398; TIAS 4625; art. IV para. (3).
5 U. S. T. 1829; TIAS 3057; art. VII para. (3).
8 U. S. T. 899; TIAS 3853; art. IV para. (2).
1 U. S. T. 785; TIAS 2155; art. VIII para. (2).
63 Stat., 2255; TIAS 1965; art. V.
11 U. S. T. 1835; TIAS 453; art IV para. (2).
63 Stat. 1299; TIAS 1871; art. IV para. (2).
8 U. S. T. 2043; TIAS 3942; art. VI para. (4).
9 U. S. T. 449; TIAS 4024; art. VI para. (4).
12 U. S. T. 110; TIAS 4683; art. VI para. (4).
12 U. S. T. 1703; TIAS 4890; art. IV para. (2).

THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 190 (1963), providing that:

> "The taking by a state of property of an alien is wrongful under international law if . . . it is not accompanied by payment of just compensation or, under the law and practice of the state in effect at the time of taking, there is not reasonable provision for the determination and payment of just compensation. . . ."

"Just compensation" is defined in Section 192 as "adequate in amount . . . paid with reasonable promptness . . . and . . . paid in a form that is effectively realizable by the alien. . . ."

A recent formulation of these principles is also contained in the DRAFT CONVENTION ON THE PROTECTION OF FOREIGN PROPERTY prepared by a Committee of the Organization for Economic Cooperation and Development, Article 3 of which states:

> "No Party shall take any measures depriving, directly or indirectly, of his property a national of another Party unless . . . the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the property affected, shall be paid without undue delay, and shall be transferable to the extent necessary to make it effective for the national entitled thereto."*

Similar rules are stated in the DRAFT CONVENTION ON THE INTERNATIONAL RESPONSIBILITY OF STATES FOR INJURIES TO ALIENS prepared by the Harvard Law School

*O. E. C. D. Doc. No. 15 637 (1962).

for the International Law Commission which had been requested by the United Nations to codify international law governing state responsibility. The draftsmen of the Convention, noting that its purpose "is to codify with some particularity the standards established by international law for the protection of aliens",* provided in Article 10:

> "The taking under the authority of the State, of any property of an alien, or of the use thereof, for a public purpose . . . is wrongful if it is not accompanied by prompt payment of compensation in accordance with the highest of the following standards:
>
> "(a) compensation which is no less favorable than that granted to nationals of such State; or
>
> "(b) just compensation in terms of the fair market value of the property or the use thereof . . ., or
>
> "(c) if no fair market value exists, just compensation in terms of the fair value of such property or the use thereof."**

In the Middle East, Egypt recognized the obligation to pay compensation when it nationalized the Suez Canal. Agreement between the United Arab Republics and the Suez Stockholders, 54 AM. J. INT'L LAW 493 (1960). Similarly, Iran agreed to compensate the deprived aliens when it nationalized that nation's oil industry. See, Farmanfarma,

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*Sohn and Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 547 (1961).

**Id.* at 553.

The Oil Agreement Between Iran and the International Oil Consortium: the Law Controlling, 34 TEXAS L. REV. 259, 261 (1955).

Even some Eastern European communist states recognized a liability to compensate deprived aliens both in their nationalization decrees and by the compensation settlements reached with the protecting states of the deprived aliens. *E.g.*, Agreement of Settlement of Claims with Poland, 11 U. S. T. 1953; TIAS 4545 (1960); Doman, *Postwar Nationalization of Foreign Property in Europe*, 48 Col. L. Rev. 1125, 1143 *et seq.* (1948). These states, in treaties between themselves, have also recognized the obligation to pay compensation for taken alien property. Drucker, *On Compensation Treaties between Communist States*, 10 INT'L & COMP. LAW. Q. 238 (1961).

Although the adjectives used to describe compensation differ, compensation must by definition be related to value. While the problem of valuation is difficult, it is generally agreed that once a value for taken property has been determined payment for less than that value does not constitute the compensation required by international law.

It is clear that the Cuban taking in this case did not provide for prompt, adequate and effective compensation. As the State Department pointed out in its note of July 16, 1960, referred to above, the seizure was:

> "both arbitrary and confiscatory in that its provisions for compensation for property seized fail to meet the most minimum criteria necessary to assure payment of prompt, adequate and effective compensation . . ."*

Although the Cuban decree gives lip service to the international law requirement of compensation, its terms, in effect,

*43 Dept. State Bull. 171 (1960).

do not provide for any payment.* As the District Court observed:

> "[I]ndeed, were the sugar quota for Cuba restored tomorrow, contributions to the compensation fund, based on the ten-year history of sugar purchases from Cuba before the year 1960, would be non existent."**

*The law provided for compensation in government bonds with terms of not less than thirty years at a minimum of 2% interest. These bonds would be amortized out of a fund consisting of 25% of the foreign exchange annually received by Cuba from U. S. sugar sales exceeding 3 million Spanish long tons, at a price not less than 5.75 cents per English pound. It would seem apparent that, given the reduction of the Cuban sugar quota, by the U. S., the funds from which the compensation would be paid would be nonexistent. Moreover, it has been observed that from 1950 to 1959 the monthly average price for Cuban raw sugar shipments to the U. S., even with the benefit of the sugar quota, at no time exceeded 5.50 cents per English pound. Indeed, in only one year from 1950 to 1959 did Cuban sugar sales to the U. S. exceed 3 million Spanish long tons. *Banco Nacional de Cuba* v. *Sabbatino*, 193 F. Supp. 375, 385-86, 386 n. 28.

In Rev. Rul. 62-197, 1962-2 Cum. Bull. 66, the Internal Revenue Service ruled that the Cuban takings were, despite the promise of payment in bonds, confiscatory thus entitling corporations whose assets were taken to qualify for a loss deduction.

> "The Internal Revenue Service recognizes that the Cuban government has taken discriminatory and arbitrary action against the property in Cuba of United States citizens and corporations, including the taking of such property without any realistic effort to provide for prompt and adequate compensation for such taking. The taking of property without compensation is confiscation. It is no less confiscation because there may be expressed intent to pay at some time in the future. . . .
>
> ". . . An act of confiscation has occurred when the taxpayer has been deprived of ownership of property . . . with little or no chance of being compensated therefor."

Moreover, the bonds described in the Cuban decree apparently have never been issued to any person or corporation whose property was taken. Reeves, *The Cuban Situation*, 17 BUS. LAWYER 980, 983 (1962).

**193 F. Supp. at 386.

Such blatant disregard for the minimum requirements of international law does not even provide a basis for argument as to the promptness, adequacy or effectiveness of the compensation.

The court of appeals was unwilling to conclude that a failure to provide compensation was of itself a violation of international law. Instead the court broadened its inquiry to consider whether the failure to pay compensation when accompanied by retaliation and discrimination violated international law. The court thus, in effect, cast doubt upon the independent obligation under international law to pay compensation.

This Court should make clear beyond doubt that the duty to compensate for taken alien-owned property, which is required by adherence to the rule of international law, is not dependent upon any other claim of illegality.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment should be affirmed.

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APPENDIX I

In the following cases municipal courts have reviewed, under their own public policy or international law, takings of property by foreign states. Those cases which discussed the issue, from which excerpts are quoted below, recognized the principle that compensation is required.

Austria:

In *Rhein-Main-Donau Ag.*, [1954] Int'l L. Rep. 212 (Constitutional Ct. 1954) (holding sufficiently definite provisions were made to compensate Germany for its interest in a power station which was partially nationalized by Austria).

> "[C]onfiscation without payment of compensation is regarded, *vis-a-vis* aliens, as inadmissible by the doctrine and practice of international law, and that this is one of those generally recognized rules of international law which [the Austrian] Constitution regards as forming an integral part of federal law."

See also:

Koh-I-Noor, L. & C. Hardtmuth v. *Koh-I-Noor Tuzkarna L. & C. Hardtmuth*, [1958-II] Int'l L. Rep. 40 (Supreme Ct. 1958) (refusing to give effect to confiscatory Czechoslovak nationalization of Czech partnership).

> "Even though one of the partners . . . received compensation for her share of one-twelfth we must regard the nationalization as confiscation because one-twelfth the sum due for compensation is only an insignificant percentage of the total value. . . ."

Danuvia Feinmechanische und Werkzeugfabrik Nationalunternehmen v. *Seiberth*, [1954] Int'l L. Rep. 38

(Supreme Ct. 1954) (holding confiscatory Hungarian nationalization of Hungarian firm did not affect property located in Austria).

> "All we have here . . . is an entirely vague promise that compensation of an uncertain amount may be paid. . . . A promise of this nature cannot divest the nationalization of the character of a confiscation."

Lederer-Ponzer v. *Rautenstrauch,* [1951] Int'l L. Rep. 204 (Supreme Ct. 1951) (holding Czechoslovakian nationalization of Czech firm did not extinguish an Austrian debt owed the former owner).

> "Once it has been found that the firm . . . has been 'nationalized',—and this equivocal term must be understood as being confiscation without payment of compensation within the sphere of Czechoslovak law—it follows that the 'nationalization' is incapable of having any legal effect within the sphere of Austrian law."

Dralle v. *Republic of Czechoslovakia,* [1950] Ann. Dig. 155 (Supreme Ct. 1950) (refusing to recognize confiscatory Czech nationalization of Czech branch of German firm).

Belgium:

Deville v. *Servais,* [1943-45] Ann. Dig. 448 (Ct. of Appeal of Liege 1946) (denying effect to compulsory purchase by German government of occupation in Belgium).

But see *Propetrol, Petroservice, and Petrolet* v. *Compania Mexicana de Petroleo and Tankage and Transport,* [1938-40] Ann. Dig. 25 (Civil Tribunal of Antwerp 1939).

British Territories:

Anglo-Iranian Oil Co. v. *Jaffrate* (The Rose Mary), [1953] Int'l L. Rep. 316 (Aden Supreme Ct. 1953) (refusing to recognize Iranian nationalization of property of U. K. company found to violate international law).

> "[T]he Iranian laws of 1951 were invalid by international law, for, by them, the property of the company was expropriated without any compensation."

See also:

N. V. De Batafsche Petroleum Maatschappij v. *The War Damage Commission*, [1956] Int'l L. Rep. 810 (Singapore Ct. of Appeal 1956) (holding Japanese seizure and exploitation of oil in violation of international laws of war did not transfer title).

Federal Republic of Germany:

Confiscation of German Property in Czechoslovakia Case, [1953] Int'l L. Rep. 31 (Federal Supreme Ct. 1953) (approving decision of Munich Ct. of Appeals refusing to recognize Czechoslovak confiscation of property of German national but remanding for reconsideration of unrelated issue).

Expropriation of Insurance Companies Case, [1951] Int'l L. Rep. 97 (Higher Ct. of Appeal of West Berlin 1950) (denying that expropriation of property in Soviet Zone extinguished mortgage debt owed by West Berliners to Western Zone insurance companies).

> "[The defendants] have been expropriated without payment of compensation. Such expropriation cannot possibly be reconciled with the principles underlying a democratic state. . . . If a court of the Eastern Zone were to give a judgment against a debtor in West Berlin, we could not; if the judg-

ment were based on an expropriation without compensation, deny the debtor the protection of the law [protecting him from execution of judgments against by Soviet Zone courts]".

Expropriation (Soviet Zone of Germany) Case [1949] Ann. Dig. 19 (Ct. of Appeals of Nuremberg 1949) (refusing to recognize expropriation of firm in Soviet Zone).

Confiscation of Property of Sudeten Germans [1948] Ann. Dig. 24 (Amtsgericht of Dingolfing 1948) (denying effect to Czechoslovak decree pursuant to which property of German national was confiscated).

> "The expropriation without compensation of the property of nationals of a foreign state on the mere ground that they are nationals of that state or of that nation is, accordingly, contrary to international law"

See also:

Registration of Trademark Koh-I-Noor, 1963 Neue Juristische Wochenschrift 1541 (Federal Tribunal March 8, 1963) (refusing to give effect to confiscatory Czechoslovak nationalization of Czech partnership).

> "This case concerns the expropriation without compensation of a Prague enterprise. Expropriation measures of that kind are, in accordance with a principle of domestic international administrative law, not to be recognized beyond the frontiers of the expropriating State, since they represent arrangements under foreign public law; thus, firmly established case law does not concede to them the effect of transferring title beyond such frontiers.
>
> ". . . The courts of the Federal Republic are not entitled to lend their hand to further very sub-

> stantial encouragement of expropriation measures without compensation in their territory; this would be in violation of one of the most important legal principles firmly established in the [German] constitution." (translation from the German)

But see *N. V. Verenige Deli-Maatschappijen and N. V. Senembah-Maätschappij* v. *Deutsch-Indonesische Tabak-Handelsgesellschaft m. b. H.*, Court of Appeal of Bremen, August 21, 1959, portions of decision quoted in Domke, *Indonesian Measures Before Foreign Courts*, 54 Am. J. Int'l L. 305 (1960) (recognizing Indonsian nationalization of Dutch corporation even if contrary to international law). This decision, however, only dealt with an application for an injunction in a summary procedure, and proceedings on the merits are now pending. *N. V. Verenige Deli-Maatschappijen* v. *Deutsch-Indonesische Tabak-Handelsgesellschaft m. b. H.*, 7 Zivilkammer, 7 O 183-62 (Landgericht of Bremen 1962) (pleadings on file in library of the Ass'n of the Bar of the City of New York).

France:

Société Potasas Ibericas v. *Nathan Bloch*, [1938-40] Ann. Dig. 150 (Ct. of Cassation 1939) (refusing to recognize Catalonian (Spain) decree nationalizing French and Swiss owned company).

> "French courts may not recognize any divestment of a right of ownership, except with consent of the owner, without just and previous indemnity."

Volatron v. *Moulin*, [1938-40] Ann. Dig. (Ct. of Appeal of Aix 1939) (refusing to recognize Catalonian (Spain) decree nationalizing French and Swiss owned company).

> "The deposits, factories and stores of the company in Spain have been expropriated and collectivised in

> virtue of administrative or government decisions which did not provide for a previous just indemnity required by French law in the case of expropriation. They are contrary to French public order and cannot be applied to France. . . ."

See also:

V. E. B. Carl Zeiss Jena v. *Firm Carl Zeiss,* Court of Appeal of Paris, First Chamber, April 2, 1963 (text of decision on file in library of Ass'n of Bar of the City of New York) (refusing to give effect to East German expropriation of East German firm did not transfer ownership of trademark).

> "It is a rule [as to expropriation without indemnification] to refuse, by way of exception on grounds of the international public order, any recognition even as to those assets located in the expropriating State, and any effect in third States." (translation from the French.)

Enterprise Nationale L. et C. Hardtmuth, Fabrique de Crayons Koh-I-Noor v. *Fabrique de Crayons Koh-I-Noor, L. et C. Hardtmuth,* [1958-II] Int'l L. Rep. 50 (Court of Appeal of Paris 1958) (refusing to give effect to a confiscatory Czechoslovak nationalization of Czech partnership).

> "[T]he measures of nationalization taken by the State of Czechoslovakia . . . constituted an expropriation without payment of compensation . . . Such measures are essentially contrary to French public policy."

Jellinek v. *Levy,* [1919-42] Ann. Dig. Supp. Vol. 24 (Tribunal Commercial of the Seine 1940) (refusing to give effect to confiscation decree issued by German government of occupation affecting property of Czech national).

> "It is undisputed that among the principles which do honor to French law, are, on the one hand, the prohibition from expropriation unless in the public interest and subject to a just and previously fixed compensation. . . . In these circumstances, the French courts cannot permit that acts of violent confiscation . . . without just compensation should have any effect on the territory of the Republic."

Italy:

Anglo-Iranian Oil Co. Ltd. v. *S. U. P. O. R. Co.*, [1955] Int'l L. Rep. 19 (Court of Venice 1953) (reviewing Iranian nationalization of property of U. K. company but holding it was not contrary to Italian "public order").

> "Among the principles included under the generic name of 'public order' is doubtless the one that no person should be deprived of his property without compensation. . . ."

Anglo-Iranian Oil Co. Ltd. v. *S. U. P. O. R. Co.* [1955] Int'l L. Rep. 23 (Civil Court of Rome 1954) (reviewing Iranian nationalization of property of U. K. company but holding it was not contrary to either Italian public policy or international law).

> "[T]he Iranian Oil Nationalization Laws of 1951-1952 may . . . be applied in Italy as they are not contrary . . . to international public policy or to any generally accepted principles of international law, since they . . . recognize the right of expropriated foreign nationals to compensation."

See also:

Koh-I-Noor Tuzkarna L. & C. Hardtmuth Narodni Podnik v. *Fabrique de Crayons Hardmuth L. & C., S.r.l.* [1958-II] Int'l L. Rep. 44 (Ct. of Appeals of Turin 1958) (refusing to give effect to confiscatory Czechoslovak nationalization of Czech partnership).

"In accordance with the constitution and basic principles of private international law, an expropriation carried out in a foreign country is generally recognized, provided that the expropriating country recognizes the right to an indemnity and that the latter is adequate and is paid at the time of transfer.

"Where the guarantee of an adequate indemnity and its paymment is lacking, the expropriation becomes a confiscation which is a typically political act and cannot produce any effect outside the country of confiscation."

Szit Impresa Nazionale è Bata s.p.a. v. *Soc. B. S. F. Stiftung, Cipera e Bata*, 40 Rivista di Diritto Internazionale 264 (1957) (Ct. of Appeal Bologna 1956), noted in 5 *Int'l & Comp. L. Q.* 606 (1956) (refusing to give effect to confiscatory Czechoslovak nationalization of Czech firm).

Japan:

Anglo-Iranian Oil Co. v. *Idemitsu Kosan Kabushiki Kaisha*, [1953] Int'l L. Rep. 312 (Tokyo High Court 1953) (reviewing validity under international law and Japanese public policy of Iranian nationalization of property of U. K. company but holding it did not violate public policy and questioning whether review under international law was permissible).

"There is an established principle of international law that in the event of a violent social reform or revolution in a state . . . property belonging to foreign nationals can only be expropriated with compensation; it cannot be confiscated. Moveover, such compensation must be 'adequate, efficient and immediate compensation.'"

Netherlands:

P. T. Escomptobank v. *N. V. Assurantie Maatschappij de Nederlanden*, (Ct. of Appeal at The Hague June 6, 1963)

(text of decision on file in Library of Ass'n of the Bar of the City of New York) (holding Indonesian nationalization of Dutch corporations was confiscatory and discriminatory).

> "[W]hile respecting the rule that in general a Netherlands court may not pass judgment on the lawfulness of acts performed jure imperii by a foreign power, in a law suit between private companies that same court is bound to take no account of such acts of State and to regard them as non-existent if they are at variance with (unwritten) rules of international law for the protection of private interests;
>
> ". . . [C]onfiscation of the Indonesian subsidiaries of the respondents without any compensation . . . constitutes a serious breach of the said rules of international law and as such accordingly cannot be recognized by the Netherlands courts and measures taken in that behalf must therefore be regarded as non-existent." (translation from the Dutch)

Bank Indonesia v. *Senembah Maatschappij N. V. and De Twentsche Bank N. V.*, (1959) Nederlandse Jurisprudentie 855 (Ct. of Appeals of The Hague 1959), portions of decision quoted in *7 Netherlands International Law Review* 400 (1960) (refusing to recognize Indonesian nationalization of Dutch corporation as it was violative of international law).

> "[The offer of compensation] is completely unelaborated and offers all kinds of possibilities of evasion . . . [and] does not . . . provide any adequate guarantee that the owners of the enterprises concerned will indeed receive any indemnification . . . [This constitutes] an evident serious violation of international law, and is therefore unlawful and of no legal effect."

Hunzedal Ltd. v. *Smit*, [1919-42] Ann. Dig. Supp. Vol. 33 (Dist. Ct. of Amsterdam 1940) (denying claim against Dutch company by a Nazi-appointed administrator of a Polish firm).

See also:

Hahn Röhren-Walzwerk v. *Stokaris (Bánská a Hutni-Spalecnost Narodni Podnik, Interveners)* [1952] Int'l L. Rep. 16 (Ct. of Appeal of Arnhem 1952) (refusing to give effect to confiscatory Czechoslovák nationalization of Czech firm).

> "[T]he executive regulations of the Minister of Industry gave no guarantee that compensation would be given, nor did they impose upon the State any obligation to that effect.
>
> "As there was no right to compensation, the nationalization was contrary to Netherlands order public. . . ."

Switzerland:

Rosenberg v. *Fischer*, [1948] Ann. Dig. 467 (Federal Tribunal 1948) (refusing to recognize title acquired from Germans who seized property during war) ("object seized from its owner in a manner contrary to international law has, without doubt, the character of a stolen or lost property").

See also:

Vereinigte Carborundum und Electritwerke v. *Federal Department for Intellectual Property*, [1956] Int'l L. Rep. 24 (Federal Tribunal 1956) (refusing to give effect to confiscatory Czechoslovak nationalization of Czech firm).

> "[T]here is no doubt that in the present case we are not dealing with expropriation subject to adequate

compensation but with acquisition without compensation (confiscation)."

German Assets in Switzerland (I. G. Farben) Case [1949] Ann. Dig. 84 (Dist. Ct. of Zurich 1949) (holding seizure of German firm by Allied Powers did not extinguish claims of creditors against assets in Switzerland).

> "It is clear that such expropriation without compensation is contrary to the principles of Swiss law."

United Kingdom:

Wolff v. *Oxholm* (1817) 6 M & S 92 (refusing to recognize a Danish decree confiscating debt of Danish subject to British national as not conformable to the usage of nations).

In re Fried, Krupp (1917) 2 Ch. 188 (refusing to recognize a German law canceling interest payable under a German contract by the German corporation to an English firm).

But see *In re Helbert Wagg & Co. Ltd.* [1956] 1 Ch. 323, 347-9 (1956) (dictum).

APPENDIX II

In the following cases various international tribunals have recognized that a state must provide compensation for the taking of alien-owned property. No contrary decisions of international tribunals have been found.

Affaire Goldenberg (Germany/Roumania), 2 U. N. Rep. Int'l. Arb. Awards 901, 909 (Tribunal pursuant to Treaty of Versailles 1928) (awarding compensation for requisition by Germany during World War I of property of Roumanian national)

> "[I]f international law authorizes a State, for reasons of public purpose, to depart from the principle of respect for private property of aliens it is a *sine qua non* that the property expropriated or requisitioned be equitably compensated as quickly as possible." (Translation from the French)

Norwegian Shipowner's Claim (Norway/United States), 1 U. N. Rep. Int'l Arb. Awards 307, 334, 338 (Perm. Ct. Arb. 1921) (awarding compensation to Norwegians for requisitioning by U. S. during World War I of their ships under construction in U. S.)

> "Whether the action of the United States was lawful or not, just compensation is due to the claimants under the municipal law of the United States, as well as under the international law, based upon respect for private property."
>
> No State can exercise toward the citizens of another civilised State the 'power or eminent domain' without respecting the property of such foreign citizens or without paying just compensation as determined by an impartial tribunal, if necessary."

Marguerite de Joly de Sabla (United States/Panama), 6 U. N. Rep. Int'l Arb. Awards 358, 366 (American-

Panamian General Claims Arbitration 1933) (awarding compensation to American nationals for land owned in Panama which Panamanian Government had adjudicated to others)

> "It is axiomatic that acts of a government in depriving an alien of his property without compensation impose international responsibility. . . . It is no extreme measure to hold, as this Commission does, that if the process of working out the system results in a loss of the private property of aliens, such loss should be compensated."

Shufeldt Claim (United States/Guatemala), 2 U. N. Rep. Int'l Arb. Awards 1079, 1095 (Arbitration pursuant to Special Agreement 1930) (awarding indemnification to American national for termination of Guatemala chicle concession by Government of Guatemala)

> "But this Tribunal is only concerned where such a decree, passed even on the best of grounds, works injustice to an alien subject, in which case the Government ought to make compensation for the injury inflicted and can not make any municipal law for their refusal to do so."

Walter Fletcher Smith Claim (United States/Cuba), 2 U. N. Rep. Int'l Arb. Awards 913 (Arbitration pursuant to Special Agreement 1929) (awarding compensation to American national for property owned in Cuba which Cuban Government expropriated)

Landreau Claim (United States/Peru, 1 U. S. Rep. Int'l Arb. Awards 347. (Arbitration pursuant to Special Agreement 1921). (awarding compensation to American national for repudiation of concession for working guano deposits in Peru by Peruvian Government)

Spanish Zone of Morocco Case (Great P tain/Spain), 2 U. N. Rep. Int'l Arb. Awards 615, 647, 68. (Arbitration pursuant to British-Spanish Agreement 1925) (series of settlements of claims of British protected persons against government of Spain)

Upton Case (United States/Venezuela), Ralston, Venezuelan Arbitration of 1903 at 172, 174 (American-Venezuelan Mixed Claims Comm.) (awarding compensation to American national for ships seized by Venezuelan Government)

> "The right of the State, under the stress of necessity, to appropriate private property for public use is unquestioned, but always with the corresponding obligation to make just compensation to the owner thereof."

Selwyn Case (United States/Venezuela), Ralston, Venezuelan Arbitrations of 1903, at 322, 326 (American-Venezuelan Mixed Claims Comm.) (Return by Umpire to Commissioners claim of American national for compensation for seized ship)

> "This act of the Government may have proceeded from the highest reasons of public policy and with the largest regard for the State and its interests; but when from the necessity or policy of the Government it appropriates or destroys the property or property rights of an alien it is held to make full and adequate recompense therefor."

The U. S. A. on Behalf of Singer Sewing Machine Company v. *Turkey*, Nielsen, Turkish-American Claims Settlement, 490 (1937) (awarding compensation for the requisition of property of an American corporation by Turkey)

"It is believed that in the ultimate determination of responsibility under international law, application can properly be given to principles of law with respect to confiscation, and that the confiscation of the property of an alien is violative of international law.

"The payment of inadequate compensation, not voluntarily accepted as an adequate settlement, may be considered to be a confiscation of property to the extent of the inadequacy of payment."

The U. S. A. on Behalf of Ina M. Hoffman and Dulcie H. Steinhardt v. *Turkey*, Nielsen, Turkish-American Claims Settlement 286, 289 (1937) (holding claim for compensation by American nationals was unsubstantiated)

"[T]here is an abundance of evidence in various forms to show general recognition of the principle that the confiscation of the property of an alien is a violation of international law."